

[07-Jun-1991]

STATE OF VERMONT
PROFESSIONAL CONDUCT BOARD

In Re: PCB File No. 89.43

NOTICE OF DECISION

PCB NO. 13

Procedural History

This matter was heard before a duly appointed hearing panel of the Professional Conduct Board. The panel consisted of Joseph F. Cahill, Jr., Esq., chair, Deborah S. Banse, Esq., and Mr. Donald Marsh. The hearing panel proposed findings of fact and conclusions of law which were adopted by the full Board. Upon consideration of the hearing panel's report and upon consideration of arguments and briefs submitted by Respondent and Bar Counsel, the Board has found that Respondent violated DR 7-104(A)(1). The Respondent has been issued a private admonition for this violation. The Board has dismissed two other counts, finding insufficient evidence of these additional violations.

Set forth below are the Board's findings of fact and conclusions of law.

Findings of Fact

1. Respondent served as counsel for a municipality.
2. A non-profit corporation constructed a building within the municipality.
3. Upon completion of the building, a dispute arose between the municipality and the corporation as to whether the corporation was entitled to a certificate of occupancy.
4. At the time this dispute arose, litigation was pending between the municipality and the corporation regarding the municipality's denial of a conditional use permit regarding a different property owned by the corporation.
5. Representatives of the municipality and the corporation met in an effort to resolve the dispute regarding the certificate of occupancy. Respondent attended the meeting, as did counsel for the corporation.
6. During the meeting, the municipality offered to grant the certificate of occupancy if the corporation dropped its pending law suit against the municipality. This offer was rejected by the corporation.
7. Respondent left the meeting with the belief that an agreement had been reached between the municipality and the corporation. Representatives of the corporation, however, including counsel, felt at the conclusion of

the meeting that no settlement had been reached.

8. Respondent sent a proposed consent judgment to counsel for the corporation. Counsel for the corporation eventually informed Respondent that the corporation would not be signing the consent judgment.

9. When Respondent learned that there was no settlement agreement, he became concerned that the corporation might occupy the newly constructed building without obtaining the necessary occupancy permit. He, therefore, drafted a letter addressed to the president of the corporation. In the letter, Respondent advised the corporation that Respondent would prosecute the corporation both civilly and criminally if the corporation occupied the building without a certificate of occupancy.

10. Respondent testified the panel and Board so found that Respondent's purpose in writing this letter was to deter a violation of the zoning ordinance. Respondent's purpose was not to obtain any advantage in the litigation which was pending with the corporation.

11. After writing the letter and while waiting for the secretary to put postage on it so that Respondent could mail the letter on his way home, Respondent received a call from the clerk of the Superior Court. The clerk advised Respondent that there was to be a hearing on a request for a temporary restraining order which had been filed by the corporation. The clerk requested Respondent's appearance at the court for the hearing.

12. The corporation was represented at that hearing by counsel and by the vice president of the corporation. Respondent was among the attorneys who represented the municipality.

13. At no time material herein had counsel for the corporation authorized Respondent to communicate directly with his client, the corporation.

14. There was conflicting testimony presented as to how and when the Respondent delivered the letter addressed to the president of the corporation. However, there is no conflict that at some point the vice president personally delivered the letter to the president. During the course of the court hearing, counsel for the corporation raised the letter as an issue with the presiding judge.

15. After hearing the matter, the court granted a temporary restraining order allowing the corporation to occupy the building.

16. Subsequently, the matter was settled between the corporation and the municipality along the same terms as the municipality had previously proposed and the corporation had previously rejected.

17. Prior to executing the settlement agreement with the municipality, the management of the corporation held a number of meetings to discuss the various pros and cons of settling the case. The final decision was based on a vote which was a tie vote. The president of the corporation cast the deciding tie-breaking vote in favor of settlement.

18. Although there was testimony offered as to what impact the letter of August 15th had on the president's decision to settle the dispute, the panel and the Board cannot find by clear and convincing evidence that the

letter of August 15th had an impact on the president's decision to settle the case. The president testified and the Board so finds that he based his decision to vote in favor of settlement in order to avoid an ongoing legal battle with the municipality and in order to avoid the risk of losing the right to occupy the newly constructed building.

Conclusions of Law

The Respondent was charged with violating three provisions of the Code, DR 7-104(A) (1) (communicating with a person of adverse interest); DR 7- 105(A) (threatening criminal prosecution in order to gain an advantage in a civil matter); DR 1-102(A) (5) (engaging in conduct that is prejudicial to the administration of justice). The panel and Board find that there is clear and convincing evidence that Respondent violated the provisions of DR 7- 104(A) (1). The other two counts are dismissed.

DR 7-104(A) (1) provides, in pertinent part, as follows:

During the course of his representation of a client, a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with the party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

In this case, there is no dispute that the Respondent prepared a letter addressed to the president of the corporation, knowing at the time that the corporation was represented by counsel. The record here demonstrates that the dispute between the corporation and the municipality had been an ongoing one. It was obvious that the issue of the occupancy of the building was critical to the corporation. A series of meetings and discussions were held between the parties in an effort to resolve those issues. There can be no claim, and there is no claim, by Respondent that he did not know that the corporation was represented by counsel. Under the provisions of DR 7- 104(A) (1), if Respondent felt it incumbent upon him to generate a warning to the corporation to refrain from occupying the building, he should have addressed his communication to counsel for the corporation.

The Respondent was also charged with violating DR 7-105(A) which provides: "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." (Emphasis supplied). There is evidence from which this Board can conclude that the underlying civil litigation had some effect on Respondent's decision to threaten pressing of criminal charges. However, the Board cannot find by clear and convincing evidence that the sole purpose of presenting the letter, in the mind of the Respondent, was to gain an advantage in the litigation that was then pending between the municipality and the corporation. That charge, therefore, has been dismissed.

Respondent was also charged with violating DR 1-102(A) (5): "A lawyer shall not engage in conduct that is prejudicial to the administration of justice." Bar counsel argued that the threats of criminal prosecution had led the corporation to change its position from a commitment to litigate to a decision to settle, thus improperly interfering with the

corporation's pursuit of its available legal remedies. However, there is insufficient evidence from which the panel and the Board can conclude that the threats of criminal prosecution contained in the letter influenced the president's decision in settling the dispute. Because there is not clear and convincing evidence to support a violation of DR 1-102(A)(5), that count is also dismissed.

Conclusions

Both Bar Counsel and the panel have recommended that the appropriate sanction in this case is a private letter of admonition. The Board concurs with that recommendation and has issued such an admonition to Respondent.

Dated at Montpelier, the 7th day of June, 1991.

/s/

J. Eric Anderson, Chair

/s/

Deborah S. Banse, Esq. Christopher L. Davis, Esq.

/s/

Anne K. Batten

/s/

Hamilton Davis

/s/

Leslie G. Black, Esq.

/s/

Rosalyn L. Hunneman

/s/

Richard L. Brock, Esq. Donald Marsh

/s/

Joseph F. Cahill, Jr., Esq. Joel W. Page, Esq.

/s/

/s/

Karen Miller, Esq.

/s/

Edward Zuccaro, Esq.